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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
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10 United States of America,
11 Plaintiff,
12 v.
13 Jesus Ruben Nevarez,
14 Defendant.

 No. CR-13-00175-TUC-CKJ

ORDER

15 On September 13, 2013, Magistrate Judge Leslie A. Bowman issued a Report and
16 Recommendation, (Doc. 56), in which she recommended denying Defendant's Motions
17 to Suppress Statements. (Docs. 37, 45). On September 24, 2013, the government filed a
18 Notice of No Objection to the Report and Recommendation. (Doc. 59). Defendant filed
19 an Objection to the Report and Recommendation on September 27, 2013. (Doc. 63). On
20 October 2, 2013, the government filed a response to Defendant's objections.

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22 **I. STANDARD OF REVIEW**
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24 The Court reviews *de novo* the objected-to portions of the Report and
25 Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for
26 clear error the un-objecteted to portions of the Report and Recommendation. *Johnson v.*
27 *Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *See also Conley v. Crabtree*, 14
28 F.Supp.2d 1203, 1204 (D.Or.1998).

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2 **II. FACTUAL BACKGROUND**

3 On September 3, 2013, Magistrate Judge Bowman conducted an evidentiary
 4 hearing. Customs and Border Protection Officers Gilbert Guerra, Marco Antonio Estrada
 5 Jr., Francisco Hernandez, and Thomas Vader testified for the government. The
 6 Defendant testified in his own defense.

7 According to the witness' testimony, on January 10, 2013, the Defendant and a
 8 child attempted to enter the United States through the Nogales, Arizona Port of Entry. At
 9 approximately 10:30 a.m., Officer Hernandez was informed that the Defendant had been
 10 detained on suspicion of attempting to smuggle the minor into the country. Officer
 11 Hernandez approached the Defendant and asked him in Spanish "do you know what you
 12 were doing was illegal." (Doc. 57 at p. 49). The Defendant responded in the affirmative.
 13 Officer Hernandez then asked the Defendant where he was planning on taking the child
 14 and how much he was going to get paid. The Defendant responded that he did not know
 15 how much he would be paid.¹ (Doc. 57 at p. 50). At this point, the Defendant had not
 16 been read *Miranda* warnings.

17 The Defendant confirmed that Officer Hernandez asked him these questions.
 18 However, the Defendant also alleged that Officer Hernandez told him that he would go to
 19 jail for five years as a result of his actions.² (Doc. 57 at p. 87-88). This conversation
 20 lasted approximately two minutes and after it was concluded, Officer Hernandez escorted
 21 the Defendant to the passport control unit. Officer Hernandez was not present for any
 22 subsequent interrogation of the Defendant. (Doc. 57 at p. 57).

23 At approximately 11:45 a.m., Officer Guerra met with the Defendant and read him
 24 *Miranda* warnings in Spanish for the first time. (Doc. 57 at p. 16). After he read the
 25 warnings, Officer Guerra permitted the Defendant to read the written Spanish warnings
 26 himself. (Doc. 57 at p. 18). The Defendant acknowledged that he understood his rights

27 ¹ The Defendant disputes that he told Officer Hernandez that he was going to be
 28 paid to bring the child across the border.

² Officer Hernandez denied telling the Defendant he would spend five years in jail.

1 and was willing to answer questions. (Doc. 57 at p. 19). The Defendant then signed the
2 *Miranda* warnings form. (Doc. 57 at p. 18). After confirming that the Defendant
3 understood his *Miranda* warnings, Officer Guerra placed the Defendant into a holding
4 cell and was not involved in any further interrogation of the Defendant. (Doc. 57 at p.
5 20).

6 At some point after the Defendant was read his *Miranda* warnings by Officer
7 Guerra, Officer Vader interrogated the Defendant. (Doc. 57 at p. 61-62, 64). Prior to
8 conducting the interview, Officer Vader confirmed that the Defendant had been read and
9 understood his *Miranda* rights. (Doc. 57 at p. 64). Officer Vader then asked the
10 Defendant if he wanted to answer questions to which the Defendant responded in the
11 affirmative. (Doc. 57 at p. 64). During the interview, the Defendant was in shackles.
12 However, he was not handcuffed. (Doc. 57 at p. 63). Initially, the Defendant denied any
13 wrongdoing. However, after Officer Vader told the Defendant that it would be beneficial
14 to him should he go before a Judge if he would just tell the truth, the Defendant changed
15 his story and acknowledged that he had just picked the child up at a hotel and was
16 supposed to deliver him to a shuttle for money. (Doc. 57 at p. 65-66). Officer Vader did
17 not threaten or make any promises to the Defendant. He never told the Defendant he was
18 going to jail, he did not raise his voice or become angry, the Defendant did not appear to
19 have any physical or mental disabilities and was not under the influence of any drugs or
20 alcohol at the time of the interrogation. (Doc. 57 at p. 66-67). The Defendant did not
21 request any breaks during the interrogation which lasted approximately 40 minutes.
22 (Doc. 57 at p. 68-70).

23 The Defendant testified and explained that on January 10, 2013, he was 19 years
24 old and had never been arrested. (Doc. 57 at p. 84). As he was attempting to pass
25 through the port of entry into the United States, he was taken to a small room where
26 Officer Hernandez spoke with him. The Defendant was then brought to another area, his
27 belongings were removed from him and he was placed in a holding cell. He
28 acknowledged that after he spoke with Officer Hernandez, he was read his *Miranda*
rights and he signed a form acknowledging that he understood his rights. (Doc. 57 at p.

1 114-120). Subsequently Officer Vader interviewed him. The Defendant contends that he
 2 was scared. However, he acknowledged that at the time of his arrest, he was in good
 3 physical and mental health, he was not taking any medications, he was never threatened
 4 or promised anything by the officers, and he was not under the influence of any drugs or
 5 alcohol at the time of the interrogation. (Doc. 57 at p. 113, 124).

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7 II. ANALYSIS

8 *Defendant's Objections*

9 Defendant objects to the Magistrate Judge's finding that the Defendant's
 10 statements were voluntary and that the statements made to Customs and Border
 11 Protection (CBP) Officer Thomas Vader were given after proper *Miranda* warnings and a
 12 voluntary waiver.

13

14 *Voluntariness of Statements*

15 Statements must be voluntary to be admissible. *Lego v. Twomey*, 404 U.S. 477,
 16 483-485 (1972). A statement is involuntary if it is coerced either by physical
 17 intimidation or psychological pressure. *United States v. Shi*, 525 F.3d 709, 730 (9th Cir.
 18 2008). An involuntary or coerced statement is inadmissible at trial because its admission
 19 is a violation of the defendant's rights to due process. *Brown v. Horell*, 644 F.3d 969,
 20 979 (9th Cir. 2011). The burden is on the government to prove voluntariness of a
 21 confession by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489
 22 (1972).

23

24 Voluntariness is determined by considering the totality of the circumstances,
 25 including "close scrutiny of the facts" to determine whether "a defendant's will was
 26 overborne by the circumstances surrounding the giving of the confession." *United States*
 27 *v. Wright*, 625 F.3d 583, 603 (9th Cir. 2010) (citations omitted). "[A] statement may be
 28 considered involuntary if it is extracted by any sorts of threats or violence, or obtained by
 any direct or implied promises, however slight, or by the exertion of any improper
 influence." *Beaty v. Schriro*, 509 F.3d 994, 999 (9th Cir. 2007) quoting *Hutto v. Ross*,

1 429 U.S. 28, 30 (1976)(internal quotations omitted).

2 “[C]oercive police activity is a necessary predicate to the finding that a confession
 3 is not ‘voluntary.’” *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). “Coercive police
 4 activity can be the result of either physical intimidation or psychological pressure.”
 5 *United States v. Preston*, 706 F.3d 1106, 1114 (9th Cir. 2013) quoting *Brown v. Horell*,
 6 644 F.3d 969, 979 (9th Cir. 2011). In determining the voluntariness of a confession,
 7 factors to consider include “the degree of police coercion; the length, location and
 8 continuity of the interrogation; and the defendant’s maturity, education, physical
 9 condition, mental health, and age.” *United States v. Preston*, 706 F.3d 1106, 1114 (9th
 10 Cir. 2013) quoting *Brown v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011) citing *Withrow v.*
 11 *Williams*, 507 U.S. 680, 693-694 (1993).

12 Defendant argues that based on the totality of the circumstances, his will was
 13 overborne and his statement were not voluntary. Specifically, he contends that his age,
 14 lack of criminal history, and the circumstances of his interrogation rendered his
 15 statements involuntary. The Defendant’s interrogation lasted less than an hour with
 16 Officer Vader. While the Defendant had interactions with two other officers, both of
 17 these interactions were relatively short. Officer Guerra read the Defendant his *Miranda*
 18 warnings and was only with the Defendant for approximately 20 minutes. Officer
 19 Hernandez’s interaction with the Defendant lasted only a few minutes and consisted of
 20 only two questions. Even assuming that Officer Hernandez discussed the potential
 21 sentence the Defendant may receive based on his arrest, actions taken by law
 22 enforcement during an interrogation such as reciting a potential sentence is not coercive
 23 conduct and does not render a suspect’s subsequent statements involuntary. *United*
 24 *States v. Haswood*, 350 F.3d 1024, 1029 (9th Cir. 2003). Additionally, while Officer
 25 Vader told the Defendant to tell the truth, imploring a suspect to tell the truth similarly
 26 does not render a suspect’s statements involuntary. *Amaya-Ruiz v. Stewart*, 121 F.3d
 27 486, 494 (9th Cir. 1997).

28 While the Defendant was only 19 years old at the time of his arrest, he had no
 physical or mental impairments, he was of sound mind, and he had held numerous jobs

1 evidencing a level of maturity. His interrogation was short and he was not denied access
2 to a bathroom, food, water, or a telephone. Finally, the officers never made any threats or
3 promises to the Defendant. After an independent review of the record, the Court finds
4 that the government has met its burden of establishing by a preponderance of the
5 evidence that Defendant's statements were voluntary and not the result of law
6 enforcement coercion.

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8 *Ineffective Miranda*

9 Defendant argues that since Officer Hernandez questioned the Defendant before
10 he was read his *Miranda* warnings, his subsequent waiver of his *Miranda* rights was
11 invalid. As a result, the Defendant's post-*Miranda* statement should be suppressed. It is
12 undisputed that when Officer Hernandez initially questioned the Defendant, he had not
13 been read his *Miranda* warnings. Magistrate Judge Bowman recommended that the
14 Court suppress the statements made to Officer Hernandez since the Defendant was in
15 custody at the time Officer Hernandez posed those questions. The government has not
16 objected to this recommendation and it is adopted by the Court.

17 However, Magistrate Judge Bowman recommended denying Defendant's Motion
18 to Suppress the Defendant's post-*Miranda* statement to Officer Vader because it was a
19 voluntary statement given after a valid waiver of the Defendant's *Miranda* rights.
20 Defendant argues that pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004), the fact that
21 the Officers initially interrogated the Defendant without the benefit of *Miranda* warnings
22 rendered his subsequent statements made after receiving *Miranda* warnings inadmissible.

23 When law enforcement elicits a statement from a suspect prior to issuing *Miranda*
24 warnings, any subsequent statement received post-*Miranda* is admissible, unless law
25 enforcement used coercive or improper tactics in eliciting the first statement or if the
26 post-*Miranda* statement was involuntary. *Oregon v. Elstad*, 470 U.S. 298, 314, 318
27 (1985). Accordingly, pursuant to *Elstad*, "if the pre warning statement was voluntary (or
28 if involuntary, the change in time and circumstances dissipated the taint), then the post
warning confession is admissible unless it was involuntarily made despite the *Miranda*

1 warnings.” *United States v. Williams*, 435 F.3d 1148, 1153 (9th Cir. 2006).

2 In *Seibert*, the United States Supreme Court held that a two-step interrogation
 3 technique in which law enforcement interrogates a suspect to extract a confession and
 4 then subsequently provides the suspect with his *Miranda* warnings and a repetition of the
 5 previously provided confession may yield inadmissible statements even in the absence of
 6 coercion. *United States v. Williams*, 435 F.3d 1148, 1154-1155 (9th Cir. 2006).
 7 Pursuant to *Seibert*, “when interrogators question first and warn later, the threshold
 8 inquiry is ‘whether it would be reasonable to find that in these circumstances the
 9 warnings could function ‘effectively’ as *Miranda* requires.’” *United States v. Williams*,
 10 435 F.3d 1148, 1154-1155 (9th Cir. 2006) quoting *Seibert*, 542 U.S. at 611-612.

11 Accordingly, when a “law enforcement officer interrogates a suspect in custody
 12 but does not warn the suspect of his *Miranda* rights until after he has made an inculpatory
 13 statement, the inquiry is whether the officer engaged in a deliberate two step
 14 interrogation.” *United States v. Barnes*, 713 F.3d 1200, 1205 (9th Cir. 2013) citing
 15 *Williams*, 435 F.3d at 1150. “Such an interrogation occurs when an officer deliberately
 16 questions the suspect without *Miranda* warnings, obtains a confession or inculpatory
 17 admission, offers mid-stream warnings after the suspect has admitted involvement or
 18 guilt, and then has the suspect repeat his confession or elaborate on his earlier
 19 statements.” *Id.*

20 According to the plurality in *Seibert*, a court must suppress a post *Miranda*
 21 statement obtained during a deliberate two-step interrogation where the midstream
 22 *Miranda* warning did not effectively appraise the suspect of his rights. *United States v.*
Williams, 435 F.3d 1148, 1157 (9th Cir. 2006). As such, if law enforcement officers
 23 deliberately employed the two-step strategy, the next step is to “evaluate the effectiveness
 24 of the midstream *Miranda* warnings to determine whether the post warning statement is
 25 admissible.” *United States v. Barnes*, 713 F.3d 1200, 1205 (9th Cir. 2013). However, if
 26 law enforcement officers did not deliberately utilize a two-step procedure to weaken
 27 *Miranda*’s protections the voluntariness test in *Elstad* controls. *United States v.*
Williams, 435 F.3d 1148, 1157-1158 (9th Cir. 2006).

1 In order to determine whether law enforcement deliberately employed the two-step
2 interrogation tactic, the court should consider whether the objective evidence and any
3 subjective evidence support the inference that the two step interrogation procedure was
4 used to undermine the *Miranda* warnings. *United States v. Barnes*, 713 F.3d 1200, 1205
5 (9th Cir. 2013). The objective evidence should include the “timing, setting, and
6 completeness of the pre warning interrogation, the continuity of police personnel and the
7 overlapping content of the pre and post warning statements.” *United States v. Williams*,
8 435 F.3d 1148, 1158 (9th Cir. 2006).

9 Officer Hernandez testified that he asked the Defendant two questions,
10 specifically, if he knew his conduct was illegal and how much he was going to be paid for
11 smuggling the child across the border. According to Officer Hernandez his reasoning for
12 asking the Defendant these two questions was to determine whether the officers had a
13 valid alien smuggling case and whether it should proceed as a criminal investigation.

14 Officer Hernandez’s questioning of the Defendant were likely and intended to
15 elicit an incriminating response. At the time Officer Hernandez questioned the
16 Defendant, he was handcuffed and in custody. The Ninth Circuit Court of Appeals has
17 noted that once a law enforcement officer has detained a suspect and questions him, there
18 is rarely, if ever a legitimate reason to delay giving a *Miranda* warning until after the
19 suspect has made an incriminating statement and the most plausible reason for the delay
20 is to weaken the subsequent *Miranda* warning’s effectiveness. *United States v. Williams*,
21 435 F.3d 1148, 1159 (9th Cir. 2006). “By any objective measure … it is likely that if the
22 interrogators employ the technique of withholding warnings until after interrogation
23 succeeds in eliciting a confession, the warnings will be ineffective in preparing the
24 suspect for successive interrogation, close in time and similar in content.” *Id.*

25 The questioning by Officer Hernandez while brief was similar in content to the
26 subsequent questioning by Officer Vader. Additionally, these two lines of questioning
27 were very close in time. As such, after an evaluation of the subjective and objective
28 evidence and a review of the relevant case law, the Court finds that the officers
deliberately utilized the two-step interrogation procedure.

1 However, this does not end the Court's inquiry. After determining that an
2 interrogator deliberately used the two-step strategy, "the Court must determine, based on
3 objective evidence, whether the midstream warning adequately and effectively apprised
4 the suspect that he had a genuine choice whether to follow up on his earlier admission"
5 *United States v. Williams*, 435 F.3d 1148, 1160 (9th Cir. 2006) *citing Seibert*, 542 U.S. at
6 615-616. In doing so, the Court must address,

7 (1) the completeness and detail of the pre warning
8 interrogation, (2) the overlapping content of the two rounds of
9 interrogation, (3) the timing and circumstances of both
10 interrogations, (4) the continuity of police personnel, (5) the
11 extent to which the interrogator's questions treated the second
12 round of interrogation as continuous with the first, and (6)
13 whether any curative measures were taken.

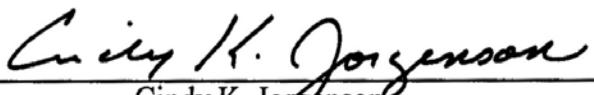
14 *United States v. Williams*, 435 F.3d 1148, 1160 (9th Cir. 2006) *citing Seibert*, 542
15 U.S. at 615. Officer Hernandez's initial questioning was brief and far from complete.
16 Officer Hernandez only asked the Defendant two questions. In contrast, the post warning
17 statement consisted of dozens of questions related to the Defendant's conduct. While the
18 two questions posed by Officer Hernandez were repeated by Officer Vader, the two
19 interrogations differed significantly in that the post warning statement elicited
20 significantly more information than the two questions asked by Officer Hernandez.

21 Further, while there was no significant break in time between the two lines of
22 questioning, after Officer Hernandez asked his two questions, the Defendant was moved
23 to another location. The Defendant was then read *Miranda* warnings by Officer Guerra
24 in Spanish and given an opportunity to read the warnings to himself. After admitting he
25 understood the warnings, the Defendant signed the *Miranda* form and Officer Guerra left
26 the room. Officer Vader then confirmed that the Defendant had read and understood his
27 *Miranda* warnings and asked him if he wanted to answer questions prior to beginning his
28 interrogation. Officer Hernandez was not present when the Defendant was read *Miranda*
warnings or interrogated by Office Vader. Further, Officer Vader's interrogation was
significantly broader and there is no evidence to support the notion that it was treated as

1 continuous of Officer Hernandez's questioning.³ As such, based upon a review of the
2 objective evidence, the Court finds that the midstream *Miranda* warnings adequately and
3 effectively apprised the Defendant that he had a genuine choice as to whether to answer
4 questions during his post-*Miranda* interrogation.

5 Accordingly, IT IS ORDERED:

6 1. The Report and Recommendation (Doc. 56) is ADOPTED.
7 2. Defendant's Motions to Suppress (Doc. 37, 45) are DENIED.
8 Dated this 13th day of October, 2013.

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12 _____
13 Cindy K. Jorgenson
14 United States District Judge
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³ In fact, the Defendant denied ever stating to Officer Hernandez that he was being compensated to bring the child across the border. Assuming the Defendant never made the incriminating statement to Officer Hernandez, there is no concern that the officers gave Defendant *Miranda* warnings and then had him repeat his earlier admissions. See *Bobby v. Dixon*, 132 S.Ct. 26, 31 (2011).